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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

PEOPLE OF THE STATE OF ILLINOIS

Cross-Petitioner,

vs.

DARRYL SIMMS,

Cross-Respondent.

Cross-Petition For Writ Of Certiorari
To The Supreme Court Of Illinois

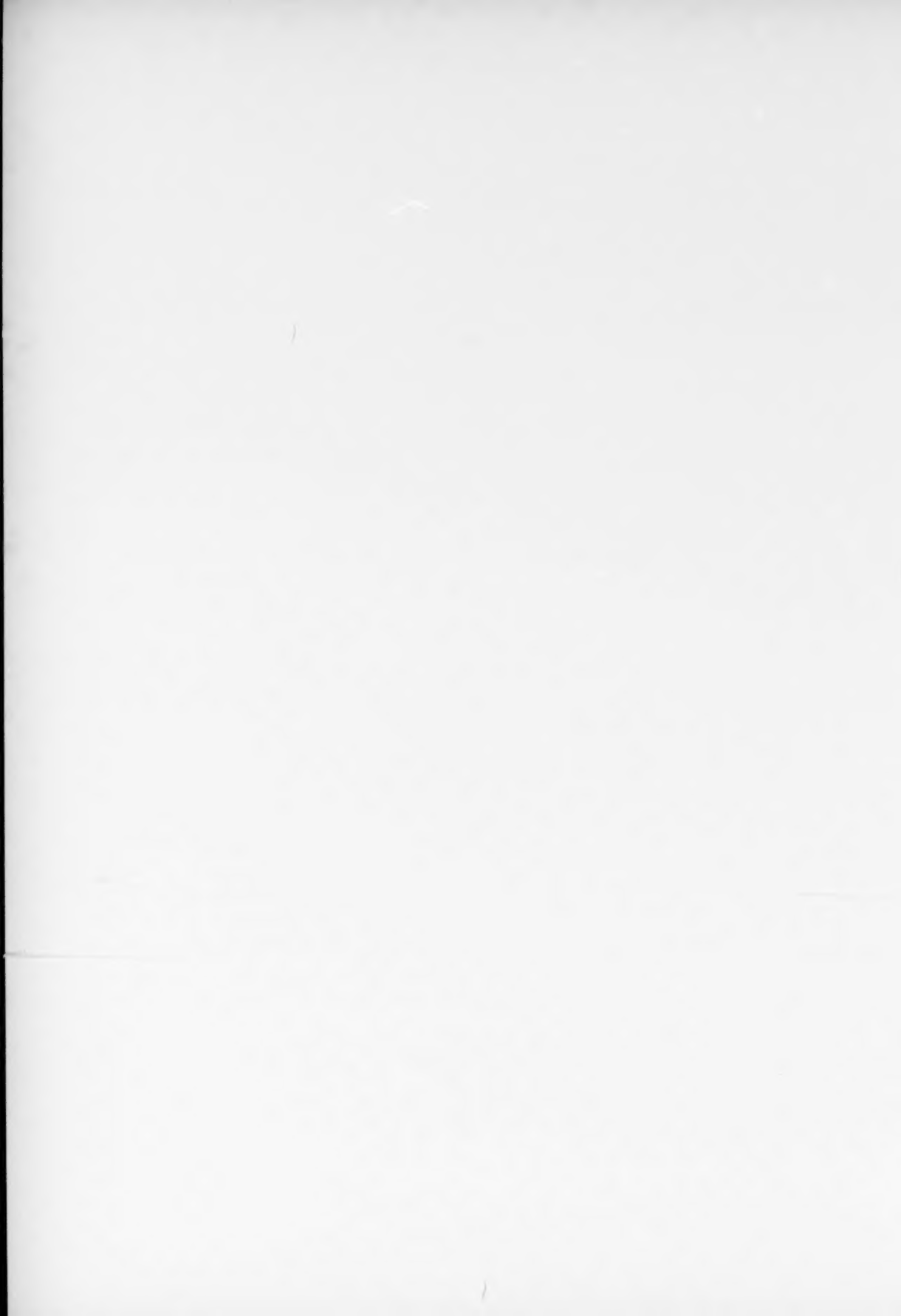
CROSS-PETITION FOR WRIT OF CERTIORARI

ROLAND W. BURRIS
Attorney General
State of Illinois

ROSALYN B. KAPLAN
Solicitor General
State of Illinois

TERENCE M. MADSEN
Assistant Attorney General
Counsel of Record
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2235

Counsel for Cross-Petitioner



QUESTION PRESENTED

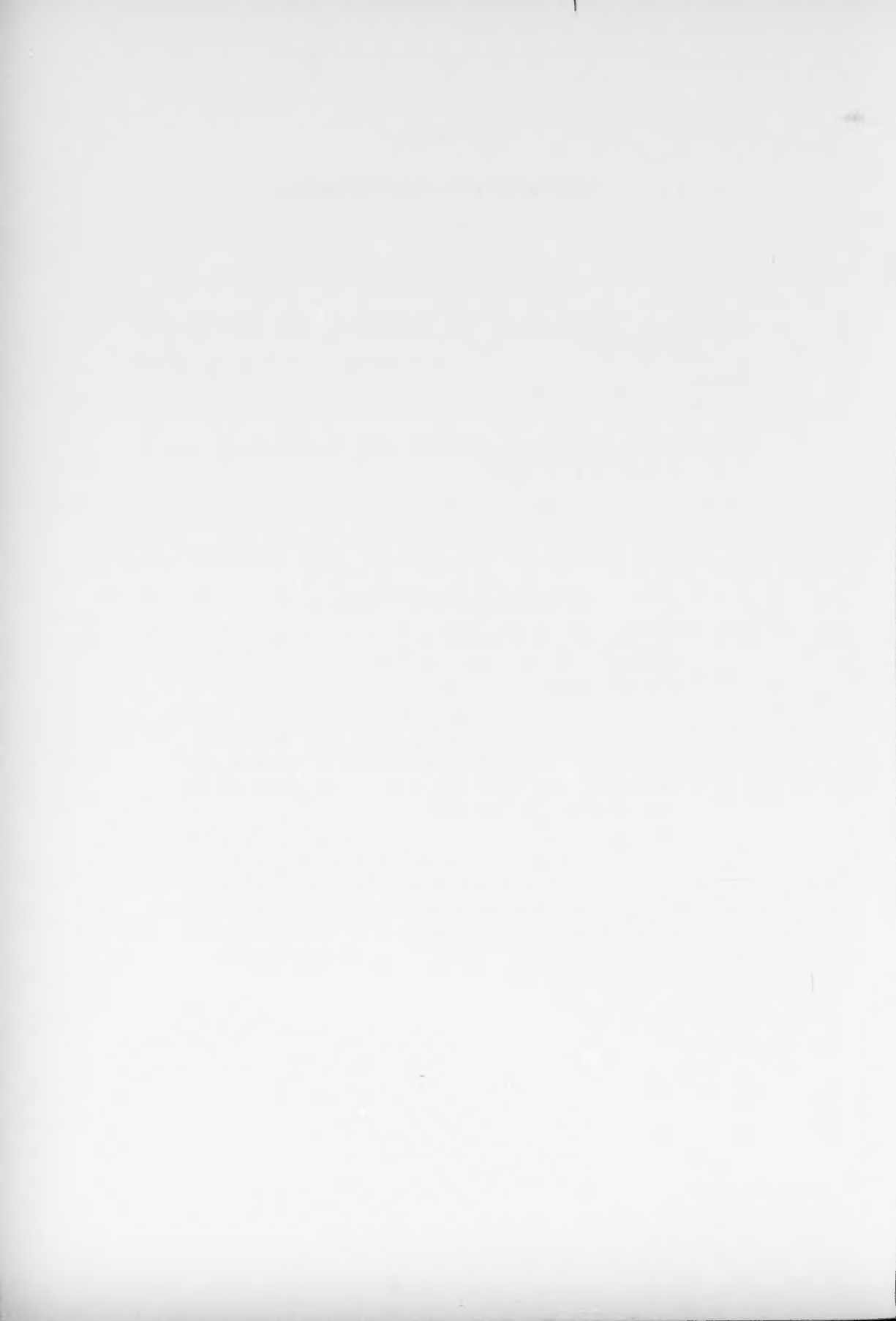
Whether a new sentencing hearing is mandatory in a capital case when the sentencing jury, which was provided with, among other evidence, several certified copies of conviction for murder in the course of various death-eligible felonies, returns a general verdict of eligibility and it is later determined that one of the underlying felonies was not included in the death penalty statute at the time the crime was committed.

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The Cross-Petitioner, People of the State of Illinois, respectfully requests this Court to issue a writ of certiorari to review the judgment and opinion of the Supreme Court of Illinois, entered on April 18, 1991.

OPINION BELOW

The opinion of the Supreme Court of Illinois is attached to the petition of Darryl Simms as Appendix A to that petition (No. 91-5664).

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on April 18, 1991. Cross-petitions for rehearing were filed on May 1, 1991. The petitions for rehearing were denied on June 3, 1991. The order denying Darryl Simms' petition for rehearing is attached as Appendix B to his petition. His petition was filed within 90 days of the denial of the petition for rehearing. This cross-petition is filed within 30 days of that filing. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment XIV, Section 1.

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

Defendant, Darryl Simms, was charged in a 23 count indictment with nine counts of murder, seven of which were felony murder, seven counts of aggravated criminal sexual assault, armed robbery, home invasion and residential burglary. All counts arose from an April 17-18, 1985, incident in which Lillian LaCrosse was raped, strangled, stabbed and robbed in her apartment in Addison, Illinois. Following a bench trial, defendant was found guilty of all counts.

Defendant was subsequently sentenced to death. The Illinois Supreme Court affirmed defendant's conviction but vacated his death sentence on January 25, 1988, in light of this Court's decision in *Booth v. Maryland*. A jury then resentenced defendant to death.

In determining initially that defendant was eligible for death, the jury considered testimony and certified copies of conviction showing conviction of intentional murder and murder in the course of the underlying felonies. On appeal defendant demonstrated that the offense of residential burglary was not an enumerated felony in the Illinois felony-murder death penalty provision at the time defendant committed this murder.

REASONS FOR GRANTING THE WRIT

A NEW SENTENCING HEARING IS NOT MANDATORY IN A CAPITAL CASE WHEN THE SENTENCING JURY, WHICH WAS PROVIDED WITH, AMONG OTHER EVIDENCE, SEVERAL CERTIFIED COPIES OF CONVICTION FOR MURDER IN THE COURSE OF VARIOUS DEATH-ELIGIBLE FELONIES, RETURNS A GENERAL VERDICT OF ELIGIBILITY AND IT IS LATER DETERMINED THAT ONE OF THE UNDERLYING FELONIES WAS NOT INCLUDED IN THE DEATH PENALTY STATUTE AT THE TIME THE CRIME WAS COMMITTED.

The Illinois Supreme Court found that defendant was entitled to a third sentencing hearing when the jury at the first phase of his re-sentencing hearing returned a general verdict of eligibility after being instructed that he was eligible if the murder was committed in the course of aggravated criminal sexual assault, home invasion, armed

robbery or residential burglary when residential burglary was not an offense establishing eligibility under the statute at the time of his offense.

In this case, the jury was informed that defendant had been convicted of felony murder under each of the state's charges at the previous trial. Specifically, the jury heard that defendant:

Was found guilty of felony murder in that he killed Lillian LaCrosse during the course of an aggravated criminal sexual assault. He was found guilty of many counts of that. He was found guilty of murder in that he killed Lillian LaCrosse during the course of a home invasion; murder in that he killed Lillian LaCrosse during the course of an armed robbery; murder during the course of a residential burglary; murder during the course of an armed robbery, so it was armed robbery, murder, residential burglary and home invasion and aggravated criminal sexual assault.

He was also found guilty of the offense of aggravated criminal sexual assault, five different counts. He was found guilty of one count of criminal sexual assault, one count of home invasion, one count of armed robbery and finally five counts of residential burglary.

(R. 694-95)

Defendant not only did not challenge that testimony on cross-examination, he emphasized it in the following exchange:

Q So, when we are talking about nine counts of murder, in fact, we are talking about one murder, we are not talking about nine murders, correct?

A We are talking about one victim but nine different ways you can commit the offense of murder.

Q And there were several other home invasions and counts like that, in essence, I guess the bottom line

is we are talking about something that occurred at one time and place, not 23 different incidents of murder, rape and so on?

A It was one transaction, yes, sir, that's correct.

(R. 696-97)

The certified convictions were admitted without objection. (R. 695) The certified convictions were also published to the jury explicitly without objection. (R. 882-83) Defendant's closing argument at the first phase did not challenge any of the convictions but focused largely on an all-or-nothing assault on the veracity of the statement given following arrest. (R. 910-17) Finally, the People note that the Illinois Supreme Court, in its first opinion in this case, affirmed all of the convictions offered to the jury. *People v. Simms*, 121 Ill. 2d 259, 520 N.E.2d 308 (1988).

Like *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) and unlike *Stromberg v. California*, 283 U.S. 259, 51 S.Ct. 476, 75 L.Ed. 1117 (1931), there is no doubt, on this record, that the death sentence was based on the felony murder factor and that the jury could and did find that factor beyond a reasonable doubt on the basis of valid criteria.

The Illinois Supreme Court also failed to consider this Court's decision in *Clemons v. Mississippi*, 494 U.S. ___, 110 S.Ct. 1141 (1990) which very clearly applies to this case. In *Clemons* this Court stated that a state reviewing court could uphold a death sentence based, in part, on an invalid aggravating factor by either reweighing the evidence or by harmless error review. *Id.* Implicitly, this Court found that including an invalid factor in the jury instruction does not result in a constitutional violation so grave as to require automatic reversal of the sentence.

Here, defendant's eligibility for the death penalty was premised on the statutory aggravating circumstance of

murder in the course of a specified felony. The jurors were told that they could find Simms eligible for the death penalty if they found that the murder occurred during the commission of certain offenses, including, erroneously, residential burglary. The jury then returned a general verdict finding Simms eligible. As Chief Justice Miller aptly pointed out in his dissent, this error was not one to rise to a level of plain error and, therefore, could have been deemed waived. Certainly, a harmless error analysis under *Zant* and *Clemons* should have been conducted by the Illinois Supreme Court.

The erroneous jury instruction was clearly harmless error beyond a reasonable doubt. Although the jury was instructed that they could find Simms eligible if they found the murder occurred in the course of residential burglary, they also were instructed that they could find him eligible if the murder occurred in the course of aggravated criminal sexual assault, home invasion or armed robbery. Evidence introduced by the State establishing these offenses were the certified convictions. Moreover, the State presented further evidence to establish particular offenses, such as aggravated criminal sexual assault. The jury had similar evidence of each offense, the certified convictions, plus other evidence further establishing particular offenses such as aggravated criminal sexual assault, any of which, except residential burglary, would have alone qualified Simms for the death penalty. The jury returned a general verdict. Considering the overwhelming evidence establishing Simms' eligibility for the death penalty introduced at the hearing, which emphasized the criminal sexual assault offense, the jury instruction pertaining to residential burglary was harmless beyond a reasonable doubt and could have been cured by the Illinois Supreme Court if that Court understood that "general verdict" error was subject to a "but for" or even

a harmless error analysis. There is no doubt whatsoever that the jury would have found Simms eligible for the death penalty without the inclusion of the residential burglary instruction.

CONCLUSION

The People of the State of Illinois respectfully ask that this Court summarily reverse the decision of the Illinois Supreme Court which interprets the "general verdict rule" of this Court to require that victims who have faced a second sentencing hearing as a result of *Booth v. Maryland* must suffer yet a third hearing on the incredible and meritless speculation that they jury might have rejected all of the certified copies of conviction except the invalid one.

WHEREFORE, for all the foregoing reasons, the People of the State of Illinois ask this Court to grant this cross-petition for a writ of certiorari and, if possible, to summarily reverse the decision of the Illinois Supreme Court.

Respectfully submitted,

ROLAND W. BURRIS
Attorney General, State of Illinois
ROSALYN B. KAPLAN
Solicitor General, State of Illinois
TERENCE M. MADSEN
Assistant Attorney General
Counsel of Record
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 814-2235

Counsel for Cross-Petitioner